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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2024-001127

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Master in Equity

and Special Circuit Court Judge

Case No. 2023-CP-07-01127

Stax Building & Development, LLC

Appellant,

v.

HHI Yacht Club Ventures, LLC

Respondent.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did The Trial Court Err In Granting Respondent's Motion To Dismiss Appellant's Lien?

STATEMENT OF THE CASE

This matter is before the Court on Appellant's appeal of the trial court's Order granting Respondent's Motion to Dismiss Lien. Prior to appeal, Appellant filed a Rule 59 Motion to Alter and Amend, which was denied. Upon information and belief, transcripts are not available for the hearing on Motion to Dismiss lien or the hearing on the Motion to Alter and Amend the trail court's Order.

STATEMENT OF THE FACTS

Appellant is a construction company whom built five condominium units in the Yacht Cove community on Hilton Head Island while under contract with the Respondent HHI Yacht Club Ventures, LLC, the owner of the underlying improved real property. Appellant's lawsuit demands damages in the amount of \$422,222 representing unpaid sums claimed due under its contract and/or under theories of unjust enrichment, together with fees and costs, as a result of Respondent's breach (Record at pp 31-37). To secure its claim, Appellant timely filed a mechanic's lien against the improved real property on February 8, 2023 (Record at p11). Although Appellant is and was a licensed builder at the time it performed its work and on the date it filed its lien, its initial lien failed to state Appellant's builder's license number on the face of the lien. The omission was not intentional. Rather, counsel for Appellant whom filed the lien for Appellant was unaware that the license number of a currently licensed contract was required to be stated on the lien, having filed many liens in the past without the license number included. Appellant's initial Complaint and an amended lien increasing the secured claim were filed June 13 (Record at p 38).

Appellant ‘subsequently amended its lien as additional sums due were discovered, and then amended and re-filed its lien for a second time by increasing its lien demand and including its builders license number next to its name in the lien text. The current lien of record, amended July 13, 2023, states Appellant’s South Carolina builders license number (Record at p 14).

ARGUMENT

As is set forth in its Order, the trial Court’s decision to dismiss the lien of record in this matter was due the omission by filing counsel of a South Carolina builder’s license number on the face of the lien as initially filed. As noted in the Order, the alleged defect was eventually corrected prior to the filing of a Motion to Dismiss for the Appellant by counsel’s filing of an amended lien stating the license number.

A. Appellant asserts that the result reached by the Court, in dismissing the lien, is not required by the statute or an equitable result under the circumstances. The South Carolina lien statute, Section 29-5-15, as amended in 2009, states “To file a mechanics' lien, a contractor must provide the county clerk of court or register of deeds proof that he is licensed or registered if he is required by law to be licensed or registered. As proof of licensure or registration, the contractor must record his contractor license number or registration number on the lien document when the lien document is filed.”. At hearing, the trial court concluded that the statutory instruction using the word “must” and concluded that this instruction is a mandatory, essential requirement. Appellant argues that the statute does not instruct or require that a lien that is missing an existing license number be stricken or dismissed upon challenge. Indeed, one of the purposes, if not the primary purpose, for requiring the contractor’s license stated on the face of the lien or ostensibly by separate representation to the Clerk of Court is to

ensure that ineligible persons or entities, in this instance being unlicensed persons or entities, would not file improper liens. The statutory requirement was intended to ensure that only licensed contractors file liens, and not to disqualify liens due to a non-material omission.

In the instant case, Appellant Stax Building and Development LLC possessed a valid South Carolina commercial contractor's license when counsel filed its initial lien in February, 2023. (Record at p30). Respondent was aware that Stax possessed a commercial buildings license because the license was posted on the building permits for the project, provided to Respondent at its request, provided to the Town of Hilton Head as condition of obtaining the building permit and was also a matter of public record at SC LLR. Respondent and/or its principal worked with Stax and its principals on numerous jobs prior to the Yacht Cove job. Respondent was not prejudiced in any manner by the omission of Stax' license number stated on the initial lien. A copy of the SC LLR site noting the existence of the license since 2021 is in the record of the proceedings below.

South Carolina General Assembly Act 40, 2009 amended the lien statute to include a requirement to include the contractor's license. This requirement was not added to the statute to provide a remedy to dismiss liens for non-paying owners due to a technical mistake by the lienor or counsel. The Act is indexed as an Act relating to the inclusion of landscapers into the lien statute framework and the first section of the Act specifically addresses landscapers.

Section 2 of the Act provides:

SECTION 2. Chapter 5, Title 29 of the 1976 Code is amended by adding:

“Section 29-5-15. (A) To file a mechanics' lien, a contractor must provide the county clerk of court or register of deeds proof that he is licensed or registered if he is required by law to be licensed or registered. As proof of licensure or registration, the contractor must record his contractor license number or registration number on the lien document when the lien document is filed.

(B) A contractor who files a frivolous lien is subject to a fine up to five thousand dollars, the loss of his registration or contractor license, or both.”

Section 3 of the Act further provides:

SECTION 3. Section 29-5-120 of the 1976 Code is amended to read:

“Section 29-5-120. (A) Unless a suit for enforcing the lien is commenced and notice of pendency of the action is filed within six months after the person desiring to avail himself of it ceases to labor on or furnish labor

or material for the building or structure, the lien must be dissolved.

(B) A mechanics' lien and associated bonds may be released by a court order, a written affidavit of the bond holder's attorney, or by a written affidavit from the defendant's attorney stating:

- (1) six months has passed since the lien was attached and no suit or notice of pendency has been filed; or
- (2) the failure of the filing party to take some other timely action required by this chapter. This affidavit must be in the form approved by the appropriate local office where the mechanics' lien was filed and must reference the lien's recording information."

Section 4 of the Act further provides:

SECTION 4. Section 40-59-30 of the 1976 Code is amended to read:

"Section 40-59-30. (A) A person or firm who engages or offers to engage in the business of residential building or residential specialty contracting without first having registered with the commission or procured a license from the commission, which has not expired or been revoked, suspended, or restricted or who knowingly presents to, or files with, the commission false information for the purpose of obtaining a license or registering with the commission is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars or more than ten thousand dollars or imprisoned for not less than thirty days, or both.

(B) Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

(C) Pursuant to Article 5, Chapter 23, Title 1, the commission may petition an administrative law judge to issue a temporary restraining order enjoining a violation of this chapter, pending a full hearing to determine whether the injunction must be made permanent.

It is important to note Section 4 of the Act amends a different section of the Code—the licensing section, and thus is reflective of the legislative intent of the Act. It was designed to address the legally problematic issue of unlicensed contractors operating in South Carolina, and specifically the problem caused by unlicensed contractors filing liens in South Carolina. Counsel spoke with one of the sponsors of the bill, former State Representative Richard Chalk from Hilton Head. Mr. Chalk did not recall the specifics of the floor debate fifteen years ago and stated his journals were not available due to loss in a hurricane flood. Mr. Chalk reaffirmed that the purpose of the law, to his recollection, was to ensure that only licensed contractors filed liens.

It is also important to note that Section 4 (B) of the Act states that a contractor may not file a mechanics lien without a license. The Act does not state that a lien without a license number stated is uncurable or fatal to the enforcement of the lien.

B. The statute does not impose a time limit for the contractor to file separate proof of licensure to the Clerk of Court or Register of Deeds, if such proof is not on the face of the lien.

In the case before the Court, the record reflects that upon learning of the requirement, Appellant caused an amended lien to be filed which states the current and applicable builder's license. Thus, the last amended lien filed in the matter satisfies the second procedure stated in the statute by informing the Clerk of Court or Register of Deeds that the contractor was licensed at the time of filing of the amended lien and was licensed at the time of the initial lien.

In the proceedings below, Respondent argued that the amendment provisions of the statute, and specifically Section 29-5-100 should be interpreted as permitting an amendment to a lien to narrowly include only instances where the amendment or correction relates to the description of the property subject to the lien description. Respondent argues that this is the only stated reason a lien can be amended. This interpretation is in conflict with lien practice in South Carolina, where liens are regularly amended to correct dates, lien amounts, property descriptions, other substantive and typographical errors and in this case, to add the contractor's license to the face of lien. The effect of the trial court's Order granting the Motion to Dismiss Lien would create precedent that a lien could only be amended after the ninety (90) day filing window to correct the legal description stated on the lien. This requirement and interpretation is not found in the statute and contravenes lien practice statewide.

The lien statute does not specifically instruct on the timing of amended liens. Thus, the lien statute does not expressly require that non material omissions, technical omissions or scriveners' errors be remedied within the initial ninety day window after the work was last performed. The omission of a valid, existing builder's license is akin to a scrivener's error. Indeed, a construction of the statute that both limits amendments in scope and requires all amendments, be they substantive or technical, to be filed within the initial ninety day window after work was last performed would essentially bar amendments since many liens are filed near or at the 90 day deadline due to marketplace realities. Generally, construction contractors

do not file liens unless work is not timely paid and is past due, and collect sums due through demand and negotiation before resorting to the legal process. A construction of the statute that voids amendments made after the ninety day window would ultimately cause contractors to file liens as soon as they complete work, without regard to timely payment. This result would both significantly increase the cost of construction, by requiring contractors to file and amend all liens almost immediately after work was performed and would burden owners with numerous liens creating clouds on title which would ultimately be cleared, at considerable expense, once payment was made in the regular course.

The Order granting the Motion to Dismiss the lien focused on doctrine of statutory construction which generally dictates that if a statute states a rule clearly and unambiguously, it should be interpreted as written. With regard to the South Carolina amended lien statute, however, there is no clear and unambiguous instruction on whether a lien is defective if it fails to state the valid and current contractor's license on the face of the lien, and there is no clear and unambiguous instruction that a lien cannot be amended to correct a technical defect after the ninety day period.

Indeed, applying the same rules of construction employed in the Order sub judice, it is noted that South Carolina Code Section 29-5-90 provides specifically for dissolution of a lien, but only in instances where the statement of account is not timely filed within ninety days. The legislature and statute created a specific section in 29-5-90 to instruct the specific and unique instance(s) when a lien is dissolved by operation of law, and that section does not reflect the instance of a technical omission such as the contractor's license. The statute does not require dissolution or dismissal in that instance which is the instance before the Court. Reading the statute narrowly, as Respondent argues, does not lead to a result dismissing Plaintiff's lien because the statute states when a lien should be dissolved or dismissed, and that situation is not

the situation where a lien omits an otherwise valid contractor's license.

C. The trial court's ruling contravenes customary lien practice in Beaufort County. Counsel's review of liens filed in Beaufort County since the Act 40 statute amendment in 2009 reflected a large number of liens, and possibly a majority of liens filed and enforced, that do not include a contractor's license on the face of the lien. As of the date of the hearing in this matter, there was no reported judicial decision whereby South Carolina appellate courts had ruled against enforcement of a lien, or upheld the dismissal of a lien, due to the omission of the contractor's license alone. Counsel argues that a significant number of attorneys and filing parties in Beaufort are not and were not aware of this requirement. The Order granting the Motion to Dismiss Lien due the omission of a statement of an otherwise valid and current license alone, even after a corrective amendment, leads to an unexpected and unfair result.

D. Foreclosure in South Carolina is an action in equity and the within suit is a lien foreclosure action. Thus, the trial court possesses discretion in this matter to evaluate the parties' positions and reach a result that balances the equities. In the instant matter, the statute states that a lienor must state its South Carolina license on or in its filed lien. It does not, however, state that the lien should be dismissed, or is unenforceable, if the license is omitted. Further, the statute does not state that the lien cannot be amended to correct this initial error, before or after ninety days. Thus, the statute is ambiguous regarding its application to the facts of this case, and the trial court possessed equitable jurisdiction to interpret the state in a manner that balances the equities and attempts to reach a fair result. In the instant case, there is no harm or prejudice to the Respondent if lien is held to be enforceable, after the amendment, and the case is permitted to proceed on the merits of the contract claims. However, the trial court's ruling presents significant potential prejudice to the Appellant whose suit is against a corporate party whom could readily sell or convert the property subject to the lien prior to adjudication of

the underlying suit, leaving the Appellant with limited and complicated collection remedies to collect on funds generated by Appellant's expended labor and improvements were it to prevail on the merits.

CONCLUSION

For the reasons stated, Appellant requests that the Honorable Court reverse the trial court's order granting Respondent's Motion to Dismiss Lien and remit this matter for further proceedings on the merits.

January 3, 2025

Respectfully Submitted,
Mogil Law Firm
/s Michael W. Mogil

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Respondent.

PROOF OF SERVICE

On the 3rd of January, 2025, the undersigned did serve a copy of Appellant's Final Brief on counsel for the Appellee at:

Jason Ward, Esq.
7 Simmonsville Rd.
Ste 200
Bluffton SC 29910
and by email.

January 3, 2025

Respectfully Submitted,

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/s Michael W.

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January 3, 2025

The Honorable Catherine Harrison
Deputy Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Stax Building & Development LLC v HHI Yacht Club Ventures, LLC
Appellate Case 2024-001127

Dear Mrs/Ms. Harrison:

Attached please find Appellants' Final with Proof of Service.

A bound copy of the final brief is being mailed to the court this afternoon.

Very Truly Yours,

/s/ Michael W. Mogil

Michael W. Mogil

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